



Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency

**UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY**

**Section 110: State Implementation Plans
September 23, 1987**

MEMORANDUM

EC-G-1998-039

SUBJECT:

Review of State Implementation Plans and
Revisions for Enforceability and Legal
Sufficiency

FROM:

J. Craig Potter
Assistant Administrator for Air and Radiation

Thomas L. Adams Jr.
Assistant Administrator for Enforcement and
Compliance Monitoring

Francis S. Blake
General Counsel Office of General Counsel

TO:

Addressees

One critical function that your offices perform is to assure that regulations developed for stationary sources by the States under the Clean Air Act are enforceable and legally sufficient. Our regulations require that the state implementation plans ("SIPs") must "be adopted as rules and regulations enforceable (emphasis added) by the State agency" (40 C.F.R. §51.281 (1987)). We are concerned that review of SIPs for enforceability has not been receiving adequate attention. The Agency sometimes experiences difficulties in its efforts to enforce the current rules because they are not sufficiently clear. The Regional Offices are at the forefront of the federal SIP approval process. The purpose of this review necessary to assure that all SIP plans and revisions are enforceable and in conformance with the Act. Please do not forward for approval SIPs which fail to satisfy the enforceability criteria in this memorandum.

Background

Recent information indicates that the attention being paid to SIP approvals is declining, particularly for enforceability. The Office of General Counsel reviews regulations as to their adequacy under applicable law and Agency policy, but not for enforceability. This void is not being filled by other offices. Often, the problems with enforcing the regulations are not immediately obvious and only become known where a case or issue focuses on the particular regulation. At the October 1986 Annapolis meeting of Air program Directors and Regional Counsel Air Branch Chiefs, a number of problems in recent enforcement cases due to difficulty in interpreting and enforcing regulations were discussed. With the recent work being done to address the nonattainment problem, it is even more critical that regulations be clear and enforceable.

It is appropriate that the Regional air compliance staff and the

Regional Counsel's Office have primary responsibility for this enforceability review because they have the most direct experience in compliance and rule interpretation. They also have resources allocated through their workload models specifically for SIP review.

Timing of Review

The Regions should try to review developing State SIP provisions prior to final approval by the State, when the provisions are at their most malleable stage. In line with this, each Region should provide its States with a copy of the implementing guidance associated with this memorandum and a briefing which outlines the enforceability requirements for new SIP submittals. If we provide the States with more explicit guidance and make earlier contacts to resolve problems, we can avoid instances where EPA is pressured to settle for a flawed regulation only because it is better than its predecessor.

Enforceability Criteria

Your review should ensure that the rules in question are clearly worded and explicit in their applicability to the regulated sources. Vague, poorly defined rules must become a thing of the past. SIP regulations that deviate from this policy are to be disapproved pursuant to Section 110(a) of the Clean Air Act, with appropriate references in the C.F.R. Specifically, we are concerned that the following issues be directly addressed. The rule should be clear as to who must comply and by what date. The effect, if any, of changed conditions (e.g., redesignation to attainment) should be set forth. The period over which compliance is determined and the relevant test method to be used should be explicitly noted. Provisions which exempt facilities under certain sizes or emission levels must identify explicitly how such size or level is determined. Also, provisions which allow for "alternate equivalent techniques" or "bubbles" or any other sort of variation of the normal mode of compliance must be completely and explicitly defined and must make clear whether or not EPA case-by-case approval is required to make such a method of compliance federally effective.

Conclusion

SIP revisions should be written clearly, with explicit language to implement their intent. The plain language of all rules, as well as the related Federal Register notices, should be complete, clear and consistent with the intended purpose of the rules. Specific review for enforceability will be a further step in improving the overall SIP process and structure.

We have attached detailed guidance to assist you in implementing this memorandum.

Attachment

Addressees:

Regional Administrators
Regions I-X

Regional Counsels
Regions I-X

Air Management Division Directors
Regions I, III and IX

Air and Waste Management Division Director
Region II

Air, Pesticides, and Toxics Management Division
Directors
Regions IV and VI

Air and Radiation Division Director
Region V

Air and Toxics Division Directors
Regions VII, VIII and X

cc: Deputy Regional Administrators
Region I-X

Regional Counsel
Air Contacts
Regions I-X

Air Compliance Branch Chiefs
Regions II, III, IV, V, VI, IX

Air Program Branch Chiefs
Regions I-X

Darryl Tyler, Director
Control Programs Development Division

Gerald Emison, Director
Office of Air Quality Planning and Standards

cc: John S. Seitz, Director
Stationary Source Compliance Division
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Alan W. Eckert
Associate General Counsel
Air Division

Michael S. Alushin
Associate Enforcement Counsel
Air Enforcement Division

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FROM:

Michael S. Aluchin
Associate Enforcement Counsel for Air
Enforcement

Alan W. Eckert
Associate General Counsel
Air and Radiation Division

John S. Seitz, Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO:

Addressees

This is to provide implementing guidance on the memorandum issued by J. Craig Potter, Thomas Adams and Francis Blake on this date relating to review of SIP plans and revisions for enforceability and legal sufficiency. We urge you to provide copies of these memoranda to your State Agency Directors.

Applicability

This guidance applies to all SIP proposals which have not completed the state or local agency legal and procedural requirements for SIPs. For proposals that have not yet been submitted to the Regional office for action, the state and local agencies have forty-five (45) days from the date of this guidance to submit such proposals for review in order for the proposal to be considered under previous procedures. SIP packages currently in Headquarters will undergo the usual review but will be returned to the Regions if they contain deficiencies which raise significant questions as to whether the regulation would be enforceable.

Enforceability Criteria

The notion of enforceability encompasses several concepts. At the most basic level, a regulation must be within the statutory authority of the promulgating agency. For example, some

states have statutory restrictions or prohibitions on the promulgation of regulations more restrictive than the federal counterpart. Although we should generally defer to a State's interpretation of the scope of its authority, when there is real doubt we should, at a minimum, consult the responsible State Attorney to be certain the issue has been considered and resolved. When appropriate, an opinion letter should be obtained from the State Attorney General.

Please ensure that the following additional issues are directly addressed.

Applicability

It should be clear as to whom the regulation applies. The SIP should include a description of the types of affected facilities. The rule should also state in which areas the rule applies (entire state, specific counties, nonattainment, etc.) and advise the reader that State administrative changes require a formal SIP revision. Also, some regulations might require a certain percentage reduction from sources. The regulation should be clear as to how the baseline from which such a reduction is to be accomplished is set. In some cases it may be necessary for enforcement purposes and independent of Clean Air Act requirements for the SIP to include an inventory of allowable and actual emissions from sources in the affected categories in order to set the above baseline.

Time

The regulation should specify the required date of compliance. Is it upon promulgation, or approval by EPA, or a future date certain? Future effective dates beyond the approved or proposed attainment date should not be allowed unless the related emissions reductions are not needed for attainment. Also, the regulation should specify the important dates required of any compliance schedule which is required to be submitted by the source to the state.

Effect of Changed Conditions

If changed circumstances affect an emission limit or other

requirement, the effect of changed conditions should be clearly specified. However, you should not approve state regulations which tie the applicability of VOC control requirements to the nonattainment status of the area and allow for automatic nullification of the regulations if the area is redesignated to an attainment status. Such regulations should continue to apply if an area is redesignated from nonattainment to attainment status unless a new maintenance demonstration supporting a change in the rule's applicability is submitted and approved by EPA.

Standard of Conduct

The regulation must be sufficiently specific so that a source is fairly on notice as to the standard it must meet. For example, "alternative equivalent technique" provisions should not be approved without clarification concerning the time period over which equivalency is measured as well as whether the equivalency applies on a per source or per line basis or is facility wide.

Incorporation by Reference

Some federal regulations are inappropriate for adoption by reference. For example, a state intending to enforce PSD regulations adopted by reference must adopt 40 C.F.R. §52.21, not 40 C.F.R. §51.166, as only the former is written in a form imposing obligations on permit applicants. Even then, changes may have to be made to take into account the difference between the State's situation and EPA's.

Transfer Efficiency

Some states have attempted to provide particular VOC sources with relaxation's of compliance limits in return for improvements in the efficiency with which the sources use the pollutant producing material. Any rules allowing transfer efficiency to be used in determining compliance must be explicit as to when and under what circumstances a source may use improved transfer efficiency as a substitute for meeting the SIP limit. Such provisions must state whether EPA approval is required on a case-by-case basis. Also, such

provisions may not simply reference the NSPS auto coating tables for the transfer efficiency. The improvement should be demonstrated through testing and an appropriate test method should be set forth. Implied improvements noted by the NSPS auto coating TE table are not to be accepted at face value.

Compliance Periods

SIP rules should describe explicitly the compliance time frame associated with each emission limit (e.g. instantaneous, stack test, 3 hour average or daily). The regions should not assume that a lack of specificity implies instantaneous compliance. The time frame or method employed must be sufficient to protect the standard involved.

Equivalency Provisions and Discretionary Emission Limits

Certain provisions allow sources to comply via "bubbles" or "alternate equivalent techniques" or through mechanisms "as approved by the Director." These provisions must make it clear as to whether EPA approval of state granted alternative compliance techniques is required on a case-by-case basis in order for the changed mode of compliance to replace the existing federally enforceable requirement. If EPA case-by-case approval will not be required, then specific, objective and replicable criteria must be set forth for determining whether the new arrangement is truly equivalent in terms of emission rates and ambient impact. Such procedures must be consistent with the control levels specified in the overall SIP control strategy and must meet other EPA policy requirements, including the "Emissions Trading Policy", 51 Fed. Reg. 43814 (1986), in relevant instances.

Recordkeeping

The SIP must state explicitly those records which sources are required to keep to assess compliance for the time frame specified in the rule. Records must commensurate with regulatory requirements, and must be available for examination on request. The SIP must give reporting schedules and reporting formats. For example, these rules must require daily records if the SIP requires daily

compliance. Additionally, the recordkeeping must be required such that failure to do so would be a separate violation in itself.

Test Methods

Each compliance provision must list how compliance is to be determined and the appropriate test method to be used. The allowable averaging times should be explicit. Both the test method and averaging times employed must be sufficient to protect the ambient standard involved.

Exemptions

If sources under a certain size are exempted from control requirements, the regulation must identify how the size of a particular source is to be determined.

Malfunction and Variance Provisions

Any malfunction or variance exemptions must be clear in their substantive application and in how they are triggered. The rule must specify what exceedances may be excused, how the standard is to be applied, and who makes the determination.

Conclusion

We appreciate your attention to this matter and hope that the specific review for enforceability will be a further step in improving the overall SIP process and structure. To assist you, we have attached an enforceability checklist. This checklist should be included as part of your technical support packages in all future SIP packages.

Please contact the appropriate staff attorney in the Office of General Counsel or the Office of Enforcement and Compliance Monitoring should you have any questions concerning issues of enforceability in particular instances. Please contact Tom Helms, OAQPS, FTS-629-5526, for other questions concerning implementation of this guidance.

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